U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9168949

Date: AUG. 28, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a sports marketing company, seeks to classify the Beneficiary as an alien of extraordinary ability. See Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not satisfied at least three of the initial evidentiary criteria, as required, and it could not make a material change to a petition. Subsequently, the Director dismissed the Petitioner's motion.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. See Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the decision and remand the matter to the Director.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010).

II. ANALYSIS

At the initial filing, the Petitioner provided a cover letter that did not claim the Beneficiary's receipt of a major, internationally recognized award under 8 C.F.R. 204.5(h)(3). Moreover, although it described "The Qualifications of [the Beneficiary] for the United States Position," the Petitioner did not identify which evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) that the Beneficiary met, nor did it explain how the submitted documentation related to the criteria.

However, the Director issued a request for evidence (RFE) and indicated, in part, that the Petitioner provided documentation relating to three criteria: original contributions at 8 C.F.R. § 204.5(h)(3)(v), leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii), and high salary at 8 C.F.R. § 204.5(h)(3)(ix). Specifically, the Director discussed letters submitted by the Petitioner under each of these criteria and suggested types of additional evidence that could be offered.

In response to the RFE, the Petitioner did not present any additional documentation relating to the evidentiary criteria. Instead, the Petitioner provided documentation regarding other benefits filed by the Beneficiary, such as adjustment of status, employment authorization, and advanced travel documentation. In addition, the Petitioner submitted an amended employment petition, requesting that the Beneficiary be re-classified as a multinational executive or manager under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

In denying the petition, the Director determined that the Petitioner could not materially change its petition by re-classifying the Beneficiary as a multinational executive or manager.[1] Furthermore, the Director listed all of the documentation submitted by the Petitioner at the initial filing, including letters, business documents, and emails, and stated that the Petitioner did not "specify which of the extraordinary ability criteri[a] the petitioner intended to address." In addition, under the discussion for each of the ten evidentiary criteria, the Director indicated "[a]t the time of the filing, the petitioner provided no evidence for this criterion." As such, the Director concluded that the Petitioner did not establish that the Beneficiary met any of the evidentiary criteria.

On motion, the Petitioner argued that the Director erred in not adjudicating the petition as a multinational executive or manager. Subsequently, the Director dismissed the motion, determining that the Petitioner

[1] The Director also concluded that prior counsel signed the amended petition rather than the Petitioner.

did not demonstrate that the decision was based on an incorrect application of law or policy. In addition, the Director stated that "in its decision to deny Form I-140, USCIS acknowledged the submission of various types of evidence and explained why it was insufficient to show the petitioner met the claimed criteria."

On appeal, the Petitioner no longer requests re-classification of the Beneficiary as a multinational executive or manager.[2] Instead, the Petitioner submits additional documentation and argues the Beneficiary's eligibility for five criteria: awards at 8 C.F.R. § 204.5(h)(3)(i), published material at 8 C.F.R. § 204.5(h)(3)(iii), original contributions at 8 C.F.R. § 204.5(h)(3)(v), leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii), and high salary at 8 C.F.R. § 204.5(h)(3)(ix).[3]

As discussed above, the Director indicated in his RFE that the Petitioner presented documentary evidence relating to three specific criteria: original contributions, leading or critical role, and high salary. Moreover, the Director discussed the evidence in the RFE as it pertained to these three criteria. However, in his denial of the petition, the Director concluded that "the petitioner provided no evidence" for each of the criteria. Furthermore, on motion, the Director indicated that "in its decision to deny Form I-140, USCIS acknowledged the submission of various types of evidence and explained why it was insufficient to show the petitioner met the claimed criteria." Again, the Director did not provide an explanation regarding the insufficiency of the documentation; rather, the Director stated that the Petitioner did not offer any evidence.

Accordingly, we will remand the matter to the Director to consider all of the evidence in the record, including the additional claims and documentation on appeal, to determine the Beneficiary's eligibility under the evidentiary criteria. If, after considering all of the evidence for the claimed criteria, the Director concludes that the Petitioner meets at least three criteria, then the Director must evaluate the totality of the evidence in the context of a final merits determination. See Kazarian, 596 F.3d at 1115. Furthermore, if the Director determines that the Petitioner does not satisfy at least three criteria, then he must explain his determination.

III. CONCLUSION

The Director did not consider evidence in the record to determine the Beneficiary's eligibility as an alien of extraordinary ability. As such, we will remand the matter for further consideration of the record, including claims and documentation submitted on appeal, and entry of a new decision.[4]

---

[2] The Petitioner is precluded from requesting a change of classification. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998); see also Brazil Quality Stones, Inc., v. Chertoff, Slip Copy, 2008 WL 2743927 (9th Cir. 2008) (once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, sua sponte, whether the alien is eligible for an alternate classification).

[3] The Petitioner also argues that its "former counsel was ineffective and prejudicial to her clients," and "it is clear that [former counsel] does not practice immigration and nationality law." The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. See Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988). Here, the Petitioner did not provide the threshold documentary requirements for asserting a claim of ineffective assistance of counsel.

[4] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. USCIS Policy Memorandum PM-602-0087, Certification

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

of Decisions to the Administrative Appeals Office (AAO) 4 (July 2, 2013), https://www.uscis.gov/laws/policy-memoranda, Adjudicator's Field Manual 3.5(c), 10.18(a)(3), https://www.uscis.gov/ilink. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. Id.